

This Opinion is not a
Precedent of the TTAB

Mailed: March 9, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

Nfinity IP, LLC

v.

Wooter, LLC

Opposition No. 91241564
to Serial No. 87493133

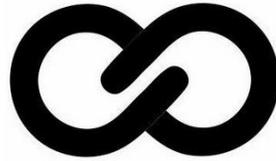
Todd Deveau of Thomas Horstemeyer LLP for Opposer, Nfinity IP, LLC.

Robert Garson of Garson, Segal, Steinmetz, Fladgate LLP for Applicant,
Wooter, LLC.

Before Mermelstein, Kuczma and English,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Wooter, LLC (“Applicant”) filed an application under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), to register the following mark on the Principal Register:

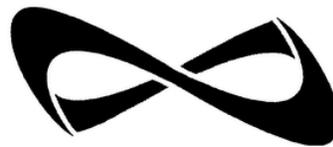


for:

Sports bags, in International Class 18; and

Hoodies; Shorts; Socks; Sports shirts; Sports caps and hats;
Sports shirts with short sleeves; Sweatpants; Sports
jackets; Sweat jackets, in International Class 25.¹

Nfinity IP, LLC (“Opposer”) opposes registration of Applicant’s mark on the ground of likelihood of confusion under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on its ownership of the following registrations:

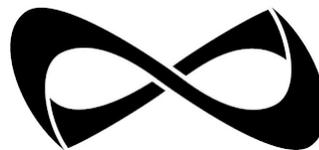


NFINITY

Registration No. 3075134 for the mark

² for:

Athletic shoes, in International Class 25;



Registration No. 3865939 for the mark

³ for:

Bags, namely, athletic bags, duffel bags, tote bags and
backpacks, in International Class 18;

¹ Application Serial No. 87493133 was filed on June 16, 2017, based on Applicant’s claim of first use anywhere and first use in commerce for the goods in International Classes 18 and 25 since at least as early as June 1, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a). “The mark consists of stylized, interrupted infinity representation.”

² Registration No. 3075134, renewed.

³ Registration No. 3865939, renewed. “The mark consists of an infinity symbol.”

Clothing, namely, shirts, sweatshirts, jackets, socks, uniforms, pants, shorts and clothing for athletic use, namely, padded combination elbow, arm and palm compression sleeves; shoes and footwear, in International Class 25; and

Protective pads for volleyball and basketball, in International Class 28;



Registration No. 3938591 for the mark ⁴ for:

Clothing, namely, shirts, sweatshirts, jackets, pants and shorts; hats and caps; shoes and footwear, in International Class 25; and



Registration No. 3975302 for the mark ⁵ for:

Clothing, namely, hats and caps, in International Class 25.

In its Answer to the Notice of Opposition, Applicant denied the salient allegations and alleged affirmative defenses (which are not true affirmative defenses but constitute amplifications of Applicant's denials of the allegations of likelihood of

⁴ Registration No. 3938591, §§ 8 & 15 accepted and acknowledged. "The mark consists of an infinity symbol under which is the word 'NFINITY.'"

⁵ Registration No. 3975302, §§ 8 & 15 accepted and acknowledged. "The mark consists of an infinity symbol."

confusion).⁶ *See* Trademark Rule 2.106(b)(2), 37 C.F.R. § 2.106(b)(2); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 311.02(b) (2020).

I. Accelerated Case Resolution

The parties agreed to resolve this proceeding by Accelerated Case Resolution (“ACR”) in lieu of trial during a telephone conference with the Board Interlocutory Attorney. The Board’s Order of February 20, 2020, approved the parties’ stipulation to proceed by ACR and their agreement regarding the ACR procedure for this case namely, that:

- The parties agreed to forego their trial periods and stipulated that they will file ACR briefs with accompanying evidence and those filings will be treated as the final record and briefs;⁷
- The Board may resolve any genuine disputes of material fact that may be presented by the record or which may be discovered by the final hearing panel;
- Evidence will be filed concurrently with the ACR briefs and all documents produced by the parties shall be deemed authentic under the Federal Rules of Evidence;
- The parties reserved the right to object to the evidence on the grounds of competency, relevance and materiality;
- No cross examination of declarants whose declarations are filed with the ACR briefs;
- The parties waived the requirement for pretrial disclosures; and
- The parties agreed to a briefing schedule and the page length of the opening briefs and Opposer’s reply brief.

⁶ 6 TTABVUE.

⁷ The parties also agreed before ACR briefing to submit stipulations regarding certain facts in this case, but no factual stipulations were filed. *See* February 20, 2020 Order (18 TTABVUE 2).

We note that regardless of an ACR stipulation, Opposer, as the party in the position of plaintiff in this proceeding, bears the burden of proof, requiring Opposer to prove its case by a preponderance of the evidence. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (“The party opposing registration bears the burden of proof, *see* § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, *see* 15 U.S.C. § 1063(b)”); *Centroamericana, S.A. v. Cervceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1311 (Fed. Cir. 1989) (plaintiff’s burden is to establish the case by a preponderance of the evidence).

In accordance with their stipulation, both parties filed ACR briefs, and Opposer filed a reply ACR brief.

II. Evidentiary Matters

Applicant objects to certain testimony offered in the Declaration of Opposer’s witness Foy N. Chalk, Jr., based on Mr. Chalk’s prior discovery deposition testimony that “he did not have the information sought.”⁸ Applicant asserts that Mr. Chalk provides information in his Declaration that was sought, but not provided in his discovery deposition.

In view of Mr. Chalk’s deposition testimony on page 70, lines 20-22 (25 TTABVUE 71) regarding whether Opposer “sell[s] into stores at all,” Applicant objects to the

⁸ Applicant’s ACR Brief p. 28-30 (32 TTABVUE 29-31). In an October 20, 2020 Order, Applicant’s Motion to Strike the Declaration of Foy N. Chalk, Jr., (“Chalk Declaration”) submitted with Opposer’s ACR Brief (23 TTABVUE 146-166), was denied. 30 TTABVUE. However, the Order noted that a specific objection to Mr. Chalk’s testimony during his discovery deposition could be raised in Applicant’s final ACR brief. 30 TTABVUE 6.

subsequent testimony in paragraph Nos. 12 and 13 of the Chalk Declaration (23 TTABVUE 148) regarding the sales and promotion of Opposer's goods. Applicant's counsel's examination of Mr. Chalk during his deposition addresses whether Opposer "sells into stores at all" and does not clarify what types of "stores," i.e., whether this addressed wholesale or retail stores, Opposer's "pop-up stores"⁹ or any other types of "stores."

Applicant also objects to paragraph Nos. 25, 26, 28, and 36-42 of the Chalk Declaration (23 TTABVUE 150-53), as allegedly precluded by the deposition testimony on page 92, line 23 through page 93, line 11 of the Chalk deposition transcript (25 TTABVUE 93-94). Applicant's counsel asked Mr. Chalk if he knew, in his personal capacity, exactly how many followers each social media account had, to which Mr. Chalk stated at that time that he "couldn't speak specifically. It's significant." (*see* 25 TTABVUE 93-94). Mr. Chalk apparently looked up and provided that information, which he attested to in his Declaration.

In general, a party that responds to a request for discovery by indicating that it does not have the information sought, or by stating objections thereto, may be barred from later introducing the information sought in the request as part of its evidence on the case provided that the party that propounded the request preserves the objection in its brief on the case. *See* TBMP § 527.01(e).¹⁰ That is not what happened in this case. Opposer's Pretrial Disclosures clearly indicate that Mr. Chalk would

⁹ *See* Chalk Declaration, ¶ No. 13 ("Nfinity also promotes and sells its goods to the general public through physical pop-up stores, . . ."). 23 TTABVUE 148.

¹⁰ 30 TTABVUE 5.

provide testimony regarding matter based on Mr. Chalk's knowledge as an agent or representative of Opposer as detailed in Opposer's Pretrial Disclosures including testimony regarding documents and information provided during discovery. (7 TTABVUE 2-3). Applicant took the deposition of Mr. Chalk in his personal capacity¹¹ while his Testimony Declaration was "based on his personal knowledge and Opposer's business records."¹² Thus, Mr. Chalk's testimony set forth in his Declaration was not based solely on his personal knowledge and does not appear to be at odds with his personal deposition testimony. Applicant's objection is overruled.

III. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's Application Serial No. 87493133, which is the subject of this proceeding. Additionally, the parties introduced the following evidence:

Opposer's evidence:

1. Evidence supported by Declaration of Hannah Reyes (litigation paralegal at Opposer's counsel's law firm) submitted with Opposer's Opening Accelerated Case Resolution Brief (23 TTABVUE):
 - Exhibit A: Atlanta Journal-Constitution article regarding Opposer (23 TTABVUE 30-38);
 - Exhibit B: Instagram posts showing third-party uses of Nfinity tags (23 TTABVUE 39-46);

¹¹ See 30 TTABVUE 2.

¹² Chalk Declaration ¶ 1 (23 TTABVUE 146).

- Exhibit C: Screenshot of Alex Aleksandrovski's (founder of Applicant) LinkedIn Profile www.linkedin.com (23 TTABVUE 47-49);
- Exhibit D: Applicant's custom uniforms and apparel on wooterapparel.com (23 TTABVUE 50-55);
- Exhibit E: Applicant's Apparel featuring products offered on wootershop.com (23 TTABVUE 56-64);
- Exhibit F: Applicant's apparel shown on wootershop.com (23 TTABVUE 65-67);
- Exhibit G: fan shops listed on wootershop.com (23 TTABVUE 68-75);
- Exhibit H: Applicant's apparel listed on Yelp (23 TTABVUE 76-114);
- Exhibit I: Better Business Bureau listing of customer reviews for Wooter, LLC (23 TTABVUE 115-126);
- Exhibit J: Images from Opposer's website offering NFINITY T-shirts www.nfiniti.com (23 TTABVUE 127-130);
- Exhibit K: Images from Opposer's website offering NFINITY athletic cap www.nfinity.com (23 TTABVUE 131-135);
- Exhibit L: Images from Applicant's website offering athletic caps and related products <https://wootershop.com> (23 TTABVUE 136-141);
- Exhibit M: screenshot of TSDR printout for Serial No. 77683900 (23 TTABVUE 142-144)

2. Testimony Declaration of Foy N. Chalk, Jr. Managing Member of Opposer (23 TTABVUE 146-156):

- Exhibit A: Wayback Machine screenshot of the www.nfinity.com/volleyball website from 2009 displaying Opposer's marks (23 TTABVUE 157-158);
- Exhibit B: examples of Opposer's promotional use of its marks (23 TTABVUE 159-161); and
- Exhibit C: images of backpacks, shoes, sports bras, caps, shorts and leggings sold under Opposer's marks (23 TTABVUE 162-166).

Additionally, Opposer submitted copies of reports from the Trademark Electronic Search System (TESS) and the Trademark Status & Document Retrieval database (TSDR) showing the current status and title of its pleaded Registration Nos. 3075134, 3865939, 3938591, and 3975302, attached as Exhibit A to the Notice of Opposition, which are received into evidence and made part of the record. 37 C.F.R. § 2.122(d).

Applicant's evidence:

1. Discovery Deposition of Foy Chalk, Jr., member of Opposer (25 TTABVUE) with Exhibits:
 - Defendant's Exhibit A: Notice of Deposition of Foy N. Chalk, Jr. (25 TTABVUE 103);
 - Defendant's Exhibit B: Opposer's Pretrial Disclosures (25 TTABVUE 104-108);
 - Defendant's Exhibit C: TESS search for marks having design code for infinity symbol (25 TTABVUE 109-123);
 - Defendant's Exhibit D: TESS Search results (25 TTABVUE 124-141);
 - Defendant's Exhibit E: TESS Search results (25 TTABVUE 142-152);
 - Defendant's Exhibit F: Amazon.com portion of website, Nfinity website (25 TTABVUE 153-174);
 - Defendant's Exhibit G: Applicant's website <https://wooterapparel.com> (25 TTABVUE 175-182);
 - Defendant's Exhibit H: TTABVUE search for documents containing NFINITY (25 TTABVUE 183-185);
 - Defendant's Exhibit I: TSDR search results (25 TTABVUE 186-198);
 - Defendant's Exhibit J: Notice of Opposition (25 TTABVUE 199-226);
2. Notice of Reliance (Wooter's Notice of Reliance No. 1) (31 TTABVUE 2-10):

- Exhibits 1.1-1.20: copies of pages from Opposer’s website featuring men’s and women’s products www.nfinity.com (31 TTABVUE 2-3, 11-21, 22-23, 24-28, 29-32, 33-36, 37-38, 39-44, 45-60, 61-70, 71-80, 81-84, 85-86, 87-88, 89-92, 93-95, 97-98, 99-100, 101-110, 111-114);
- Exhibits 2.1-2.12: copies of pages from Applicant’s Amazon webstore (31 TTABVUE 3-4, 115-118, 119-126, 127-130, 131-138, 139-140, 141-145, 146-150, 151-155, 156-160, 161-164, 165, 166-170);
- Exhibits 3.1-3.5: copies of social media pages associated with Opposer (31 TTABVUE 4, 171-174, 175-178, 179-180, 181-185, 186);
- Exhibit 4.1-4.6: copies of Google internet searches regarding Opposer (31 TTABVUE 4-5, 187-188, 189-194, 195-196, 197-198, 199-200, 201-202);
- Exhibit 5.1-5.3: copies of employee reviews of Opposer on Glassdoor.com (31 TTABVUE 5, 203-213, 214-225, 226-232);
- Exhibit 6: Series of Information Resources on Youth Subcultures: Understanding Subgroups to Better Address Barriers to Learning & Improve Schools authored by the UCLA Center for Mental Health in Schools Program and Policy Analysis (31 TTABVUE 5, 233-244);
- Exhibit 7: list of various registered trademarks of infinity loops (31 TTABVUE 6-9, 245-284);
- Exhibit M: Applicant’s advertising materials and product packaging (22 TTABVUE 3, 134-157).

3. Declaration of Alexander Aleksandrovski, founder and Chief Executive Officer of Applicant (32 TTABVUE 33-35).

Opposer and Applicant submitted trial briefs and Opposer submitted a reply brief.

IV. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing,” is a threshold issue that must be proven by the plaintiff in every *inter partes* case. To determine whether a party has established entitlement to a statutory cause of action,

we consider whether it has demonstrated a real interest in the proceeding and a reasonable belief of damage. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020) (discussing the application of the zone-of-interests and proximate causation test under *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)); *see also Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020) (discussing entitlement to bring a cause of action); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063, 1064, remain applicable as the tests “share a similar purpose and application.” *Corcamore*, 2020 USPQ2d 11277, at *7.

There is no dispute as to Opposer’s entitlement to a statutory cause of action. Opposer has made of record its Registrations Nos. 3075134 and 3938591 for the mark  for athletic shoes and clothing items in International Class 25; and Nos. 3865939 and 3975302 for the mark  for bags including athletic, duffel and tote bags in International Class 18; clothing items, including hats, in International Class 25; and protective volleyball and basketball pads in International Class 28. Therefore, Opposer possesses a real interest in the proceeding, is not an intermeddler and has met the statutory requirement of establishing a reasonable belief of damage to oppose registration of Applicant’s mark.

V. Ground for Opposition

To prevail on the ground of likelihood of confusion under § 2(d) of the Trademark Act, it is Opposer's burden to prove by a preponderance of the evidence both priority of use and likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018).

A. Priority

Because Opposer's Registrations are of record, and Applicant has not counterclaimed for cancellation of the Registrations, priority is not at issue in this proceeding with respect to the marks and goods identified in Opposer's Registrations. *See King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). This is not disputed by Applicant.

B. Likelihood of Confusion

For purposes of our likelihood of confusion analysis, we focus on Opposer's pleaded Registration Nos. 3865939 and 3975302 for the mark . We find this mark to be the most pertinent for our *DuPont* analysis. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). If we find a likelihood of confusion as to this mark, we need not find it as to Opposer's other registered mark (i.e., ). On the other hand, if we do not reach that conclusion as to the mark , we likewise would not find likelihood of confusion as to the other mark. *See Fiserv, Inc. v. Elec.*

Transaction Sys. Corp., 113 USPQ2d 1913, 1917 (TTAB 2015); *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1073 n.14 (TTAB 2011); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

In determining the likelihood of confusion, we must analyze all of the probative facts in evidence that are relevant to the factors set forth in *DuPont*, 177 USPQ at 567. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (*DuPont* “articulated thirteen factors to consider when determining likelihood of confusion”). We consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

Two key considerations are the similarities between the marks and the similarities between the goods. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We have also considered other *DuPont* factors for which the parties have submitted evidence namely, the similarity of trade channels and the conditions under which and buyers to whom sales are made, strength of Opposer’s mark, the nature and extent of actual confusion, and the length of time of concurrent use of Opposer’s and Applicant’s marks without evidence of confusion. *DuPont*, 177 USPQ at 567.

1. Similarity of the Goods, Trade Channels and Classes of Purchasers

We turn first to the second *DuPont* factor which involves consideration of the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Applicant’s goods are:

Sports bags, in International Class 18; and

Hoodies; Shorts; Socks; Sports shirts; Sports caps and hats;
Sports shirts with short sleeves; Sweatpants; Sports
jackets; Sweat jackets, in International Class 25.

Inasmuch as a definition of “athletic” is “active or gifted in sports . . .”,¹³ Opposer’s “athletic bags” in International Class 18¹⁴ are identical to Applicant’s “sports bags” in International Class 18.

With respect to the clothing items in International Class 25, shorts, socks, and hats are covered in Applicant’s application and Opposer’s Registration Nos. 3865939 and 3975302 for . Additionally, the shirts and jackets identified in Opposer’s

¹³ Definition of “athletic” 2c: active or gifted in sports, games or exercises. merriam-webster.com/dictionary/athletic. March 8, 2021.

The Board may *sua sponte* take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

¹⁴ See Opposer’s Registration No. 3865939 for the mark .

registration No. 3865939 are broad enough to encompass the sports shirts and sport shirts with short sleeves, and sweat jackets in Applicant's application. *Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described).

Some of the parties' recited goods are identical and the others are closely related. Thus, customers could reasonably presume that the goods arguably bearing similar marks originate from a common source. We need not address the similarity of all of Applicant's goods once relatedness is established for any item encompassed by the respective recitations of goods in the application and Opposer's registrations. *See, e.g., Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods or services within a particular class in the application); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014) (it is sufficient for a refusal based on likelihood of confusion that relatedness is established for a good or service in each class).

Next, we consider the *DuPont* factor concerning the trade channels and classes of purchasers. This factor relates to whether Opposer's and Applicant's identified or presumptive trade channels and customers would result in a likelihood customers would consider the parties' identified goods and services as "emanat[ing] from the same source." *Shen Mfg. Co., Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356-1357 (Fed. Cir. 2004). There are no limitations as to trade channels or classes

of customers set forth in Applicant's identified goods and most of the goods identified in Opposer's registrations.¹⁵ Because the goods overlap, we presume that both the overlapping goods move in the same channels of trade and are available to the same classes of ordinary customers. *See Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1162 (application with no restriction on trade channels cannot be narrowed by testimony that applicant's use is restricted to a particular class of purchasers); *Cunningham v. Laser Golf*, 55 USPQ2d at 1846 (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"); *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, "the marketing channels of trade and targeted classes of consumers and donors are the same"); *see also In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). Thus, the second and third *DuPont* factors strongly weigh in favor of a finding of likely confusion.

In view of the foregoing, we find that Applicant's goods and Opposer's goods are identical in-part and otherwise closely related, travel in the same channels of trade, and offered to the same classes of customers, strongly weighing in favor of a finding of likely confusion under the second and third *DuPont* factors.

¹⁵ Opposer's Registration No. 3865939 also includes "clothing for athletic use, namely, padded combination elbow, arm and palm compression sleeves; shoes and footwear."

2. Whether Purchasers of Opposer's and Applicant's Goods are Impulsive

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Purchaser sophistication or the degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005)).

Opposer contends that its and Applicant's in-part identical goods are relatively inexpensive clothing goods such as athletic shirts and shorts, which are subject to an impulsive purchase. In support, Opposer notes that Applicant's t-shirts cost around \$20, Opposer's t-shirts are similarly priced about \$25 to \$30, and both sell caps bearing their respective logos for the price of \$24.99.¹⁶ Opposer concludes that confusion is likely “[g]iven the relative economic painlessness of such transactions.”¹⁷

Opposer's limited evidence supports the conclusion that the ordinary nature of Applicant's and Opposer's sports bags and clothing items usually worn as casual attire are offered for sale to the general public and subject to impulse purchases.¹⁸

Thus, this factor is neutral.

¹⁶ See Opposer's Exhibit F, screenshots of shirts for sale on Applicant's website (23 TTABVUE 65-67); Exhibit J and K, screenshots of shirts and hats for sale on Opposer's website (23 TTABVUE 127-135); Exhibit L, screenshot of hats for sale on Applicant's website (23 TTABVUE 136-141).

¹⁷ Opposer's ACR Brief p. 22 (23 TTABVUE 23).

¹⁸ Chalk Declaration ¶¶ 7-8, 12-13, 30-31 (23 TTABVUE 147-48, 151).

3. Strength of Opposer's Marks

To determine the scope of protection to which Opposer's marks, and particularly its mark , is accorded, we consider the strength of this mark. In determining strength, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); see also *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark's strength is measured both by its conceptual strength . . . and its marketplace strength . . .”).

Fame for likelihood of confusion purposes “varies along a spectrum from very strong to very weak,” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003), and arises “as long as a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Jos. Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734, (Fed. Cir. 2017) citing *Palm Bay Imps. v. Veuve Clicquot*, 73 USPQ2d at 1694 (“[T]he proper legal standard for evaluating the fame of a mark under the fifth *DuPont* factor is the class of customers and potential customers of a product or service, and not the general public.”).

Opposer introduces evidence including the Testimony Declaration of Foy N. Chalk, Jr., its Managing Member, that it believes bears on the fame of its marks.¹⁹

¹⁹ Opposer's ACR Brief pp. 5, 22-24 (23 TTABVUE 6, 23-25); Chalk Declaration ¶¶ Nos. 12, 13, 18, 21, 22, 25, 26, 28, 29, 35, 42, 50, 51 (23 TTABVUE 148-153, 156) (23 TTABVUE 146-166).

Relevant factors supporting fame include the volume of sales, advertising expenditures, length of use of the mark, market share, brand awareness, licensing activities, and the variety of goods bearing the mark. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896-97 (Fed. Cir. 2000); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (“[O]ur cases teach that the fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.”).

Opposer’s “market includes women’s, children’s and men’s sports, including cheerleading, basketball and volleyball.”²⁰ Beginning in 2004 and continuously since then, Opposer has been offering athletic shoes, hats and caps, expanding its product line to include “shirts, sweatshirts, jackets, socks, uniforms, pants, shorts, shoes and footwear, clothing for athletic use, and protective equipment, and added various bags including athletic bags, duffel bags, tote bags and backpacks.”²¹

The testimony provided by Mr. Chalk indicates that Opposer sells its products in the wholesale and retail markets for athletic apparel, accessories, uniforms, footwear, athletic bags, and attire aimed at women, men and children, through a number of channels and outlets. Mr. Chalk’s testimony generally refers to sales and promotion of its goods to the general public, including through field sales representatives, group

²⁰ Chalk Declaration ¶ 5 (23 TTABVUE 147).

²¹ Chalk Declaration ¶¶ 7 and 8 (23 TTABVUE 147).

sales, direct sales, on social media (including Facebook, Instagram, Pinterest, Twitter, and Vimeo), through online retail platforms domestically such as amazon.com, ebay.com, championteamwear.com, cheerzone.com, and omnicheer.com, and at athletic camps and competitions. Its goods are also promoted and sold to schools as well as clubs and teams (team sales), including cheerleading, volleyball and basketball teams and clubs.²²

Mr. Chalk further testified that Opposer also sells its goods at physical pop-up stores across the U.S., “typically coincid[ing] with the Nfinity Championships and Nfinity Champions League, a series of cheerleading competitions produced, sponsored, and hosted by Nfinity,”²³ which draws “crowds of approximately 2000 attendees per day, including athletes and spectators.”²⁴ Opposer also produces, sponsors and hosts other special events including camps featuring training by top coaches in the [cheerleading] industry, hosting “twelve camps in association with its  Marks”²⁵ As of April 2, 2020, Opposer had 77,645 followers on Facebook, over 208,000 followers on its Instagram account, @nfinityshoes, and over 70,000 followers on Twitter. Additionally, Opposer maintains a Youtube channel, Nfinity

²² Opposer’s ACR Brief p. 7 (23 TTABVUE 8) citing to Chalk Declaration at ¶¶ 4-5, 9, 12, 15, 16, 36 (23 TTABVUE 146-48, 152).

²³ Chalk Declaration ¶¶ 13-14 (23 TTABVUE 148).

²⁴ Chalk Declaration ¶¶ 18-19 (23 TTABVUE 149).

²⁵ Opposer’s ACR Brief p. 7 (23 TTABVUE 8) citing Chalk Declaration at ¶ 21 (23 TTABVUE 149-150).

Athletic, which has 653,000 subscribers and 5 million views.²⁶ While Opposer's mark appears to have a fair amount of exposure, the evidence is vague in many respects. It is unclear as to the types of sports where the mark has been exposed. Much of the testimony is directed to sales and promotion for cheerleading, and the little documentary evidence there is seems to indicate that Opposer's focus is cheerleading, consistent with Mr. Chalk's experience as a college cheerleading coach,²⁷ with some limited exposure in women's volleyball and basketball.

One example highlighting Opposer's overbroad evidentiary approach to support the fame of its mark is Mr. Chalk's testimony regarding a post by Alexis Kaufman, aka Alexa Bliss, a "world-famous athlete that competes as a wrestler."²⁸ While Mr. Chalk testified that Alexa Bliss has millions of followers on both Instagram and Twitter, and that she "recently shared [an] image of her[self] wearing Nfinity shoes bearing the  mark" that was "liked" over half-a-million times, no image of Ms. Bliss wearing her Nfinity shoes bearing the  mark was attached to his Declaration, only citations to twitter.com were provided.²⁹ Although Mr. Chalk failed

²⁶ Opposer's Reply Brief at p. 10 (33 TTABVUE 14) referring to evidence discussed at Opposer's ACR Brief at pp. 8-9 (23 TTABVUE 9-10) citing Chalk Declaration ¶¶ 37-40 (23 TTABVUE 152-153).

²⁷ Chalk Declaration ¶ 2 (23 TTABVUE 146).

²⁸ Applicant's ACR Brief pp. 21-22 (32 TTABVUE 22-23); Opposer's ACR Brief p. 8 (23 TTABVUE 9); citing Chalk Declaration ¶¶ 24-25 (23 TTABVUE 150).

²⁹ Chalk Testimony Declaration ¶¶ 24-25 n.4 (23 TTABVUE 150) citing to https://twitter.com/AlexaBliss_WWE/status/1211301101582114822.

In support of various statements made in his Testimony Declaration, Mr. Chalk cites to the following websites: Opposer's website (www.nfinity.com), twitter.com, [instagram.com](https://www.instagram.com), [sgbonline.com](https://www.sgbonline.com), [yelp.com](https://www.yelp.com), the websites of various publications and a few [youtube.com](https://www.youtube.com) channels. The citations to the various websites appear to be hypertext links appearing in blue

to provide a copy of the image he was referring to, Applicant submitted the image showing that the mark on Alexa Bliss's shoe is virtually unrecognizable³⁰:



Opposer offers no evidence relating to the dollar amount of its sales or its marketing and advertising expenditures featuring its mark to substantiate the statements set forth in Mr. Chalk's Declaration, and the testimony on sales volume is vague. For example, while Mr. Chalk testified that "based on information available to [him], Nfinity has an approximate 95% market share for [the] cheerleading market that includes uniforms, shoes, and other apparel, as determined by internal market analysis," no supporting evidence of volume of sales or cheerleading market analysis

text. Except for a few pages from Opposer's website and youtube site attached as Exhibits A-C to his Testimony Declaration, no copies of the cited web pages were included. Thus, the cited web pages for which no copies were provided with his Declaration are not received into evidence. *Shael Norris v. PAVE: Promoting Awareness, Victim Empowerment*, 2019 USPQ2d 370880, at *2 (TTAB 2019); *Grote Indus., Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1200 (TTAB 2019) (Board requires all submissions to be [on paper or] filed through ESTTA); *see also In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.3 (TTAB 2012) (the Board "will not utilize a link or reference to a website's internet address to access the site to consider whatever content may appear therein").

³⁰ Applicant's Notice of Reliance Exhibit 3.5. (31 TTABVUE 186), image from https://twitter.com/AlexaBliss_WWE/status/1211301101582114822.

was provided.³¹ *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012). Additionally, Opposer notes that it has been recognized with numerous awards and recognitions.³² It has hosted nationwide competitions and camps.³³ Yet all of this is supported only by the unsubstantiated statements in Mr. Chalk's Declaration.

While Opposer's sales and promotional activities in the cheerleading market appear to be strong over the time period covered in its evidence, details regarding the markets served by such sales and promotional activities for goods bearing Opposer's mark through the present would be more supportive if they provided some indication of Opposer's sales versus sales of competitive products, as well as amounts spent on advertising and promotion of goods bearing its mark. Likewise, corroborating support for the awards and recognition that Mr. Chalk testified to and how it relates to Opposer's mark would also be helpful. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689-90 (Fed. Cir. 2018); *Bose v. QSC Audio*, 63 USPQ2d at 1305 (“[T]he fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.”).

³¹ Opposer's ACR Brief p. 24 (23 TTABVUE 25); citing Chalk Declaration at ¶ 49 (23 TTABVUE 155).

³² Chalk Declaration ¶ 43 (23 TTABVUE 153-54).

³³ Chalk Declaration ¶¶ 33-34 (23 TTABVUE 151-52).

Opposer also argues that it actively polices new registrations and enforces its rights in the  marks, engages watch services to monitor the filing of trademark applications by others, has successfully prevented the unauthorized use or registration of its  marks, as well as various other stylized infinity marks, concluding that its “robust enforcement program further strengthens” its mark.³⁴ However, the fact that Opposer filed lawsuits or “brought a number of successful trademark oppositions since its adoption of these stylized infinity marks” is not reasonably probative of the fame inquiry, which is focused on whether Opposer’s mark has achieved “extensive public recognition and renown,” not on enforcement efforts. *Omaha Steaks v. Greater Omaha Packing*, 128 USPQ2d 1693 (citing *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1720).

Despite Opposer’s argument that “[t]hrough its extensive sales, advertising, and publicity . . . , Opposer’s  Marks have become famous throughout the United States,”³⁵ the admissible evidence introduced by Opposer falls short of establishing that Opposer’s design mark is strong enough to be famous.

While the evidence falls short of establishing fame for purposes of our likelihood of confusion determination, the record supports a finding that Opposer’s mark is inherently distinctive in view of its registration on the Principal Register, and reasonably strong commercially.

³⁴ Opposer’s ACR Brief p. 24 (23 TTABVUE 25) citing the Chalk Declaration ¶¶ 45-46 (23 TTABVUE 154-155).

³⁵ Opposer’s ACR Brief p. 24 (23 TTABVUE 25).

4. Similarity of the Marks

We next consider the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *See Cai v. Diamond Hong*, 127 USPQ2d at 1800.

The parties' marks in this case are design marks which are not capable of being spoken. Thus, the question of the confusing similarity of the marks in this case must be decided primarily on the basis of the visual similarity of the marks. *See Diamond Alkali Co. v. Dundee Cement Co.*, 343 F.2d 781, 145 USPQ 211, 213 (CCPA 1965) ("When symbol marks such as these are being considered, appearance is most significant."); *see also Gen. Foods Corp. v. Ito Yokado Co. Inc.*, 219 USPQ 822, 828 (TTAB 1983) (the comparison of design marks comes down to a "subjective 'eye ball' reaction") (citing *Long John Silver's Inc., v. Lou Scharf Inc.*, 213 USPQ 263, 267 (TTAB 1982) (visual comparison of pirate design marks)). Additionally, where an applicant's goods are identical and closely related to the opposer's goods, as they are in this case, the degree of similarity between the marks that is necessary to support a conclusion of likely confusion is less than it would be if the goods were not identical. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

"[S]imilarity in appearance between marks is really nothing more than a subjective 'eyeball' test. Because a picture is worth a thousand words, there is little in the way of guidelines to determine that degree of visual similarity which will cause

a likelihood of confusion of buyers.” J. Thomas McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23:25 (5th ed. 2020).

The Board has found numerous instances of no likelihood of confusion for using the same symbol where the marks are distinctly different in overall visual appearance, even when used on competing products. *See*, for example:

- *Odom’s Tennessee Pride Sausage, Inc. v. FF Acquisition, L.L.C.*, 600 F.3d 1343, 93 USPQ2d 2030 (Fed. Cir. 2010) (a “farm boy” for grocery items



for grocery stores);

- *National Rural Electric Cooperative Assoc. v. Suzlon Wind Energy Corp.*, 78 USPQ2d 1881 (TTAB 2006),

aff’d, 214 Fed. App’x 987 (Fed. Cir. 2007) ( three “zig-zag” lines for rural electrification training and

association services, and  for wind turbines and their components);

- *In re TSI Brands, Inc.*, 67 USPQ2d 1657 (TTAB 2002) (stylized “AK” symbols for apparel, applicant’s mark

 versus cited registrant’s mark );

- *Franklin Mint Corp. v. Master Mfg. Co.*, 209 USPQ 350, 354 (TTAB 1980) (opposer’s mark  for coins, medals medallions and applicant’s mark  for jewelry);

- *Alliance Mfg. Co., Inc. v. Allied Telephone Co.*,

182 USPQ 237 (TTAB 1974) (opposer's mark  for electric motors and parts and applicant's mark  for telephonic services are distinctly different in overall appearance).

Opposer contends that the parties' marks are similar in appearance, as "both are representations of a stylized infinity symbol, wherein the outer loop portions do not entirely connect to fully enclose the two internal sections."³⁶ According to Opposer, the marks are applied to goods in such a way that average purchasers would assume they originated from the same source, particularly when viewed as applied on the respective goods. The following example shows the parties' marks used on their respective caps:



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³⁶ Opposer's ACR Brief p. 17 (23 TTABVUE 18).

³⁷ Image of Opposer's hat (23 TTABVUE 132). While Opposer also features images of both parties marks used on backpacks and athletic clothing (see pp. 18-19, 23 TTABVUE 19-20), copies of both parties' marks as used on such goods are not in the record.

³⁸ Image of Applicant's hat (23 TTABVUE 137).

Opposer's mark, which it identifies as "its 'Infinity' trademark," has the appearance of a stylized "infinity" symbol, i.e., a figure-eight on its side.³⁹ In Opposer's mark, the "infinity" symbol overlaps in the middle completing the figure eight. On the other hand, Applicant's mark has the appearance of two circles that open up into one another. The two circles in Applicant's mark remain open and "creat[e] an external disconnect with one internal space flowing into the other."⁴⁰ According to Applicant, the appearance of two circles is to remind customers of the "OO" in Wooter.⁴¹ Applicant further distinguishes the marks by noting that the "loops" in Opposer's mark are more ovoid than those in Applicant's mark which appear much rounder.⁴² Additionally, the white spaces on the edges of the "infinity loop" symbol in Opposer's mark create a three-dimensional impression, whereas Applicant's mark appears completely flat, i.e., two-dimensional.⁴³

The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks that may

³⁹ Opposer's ACR Brief p. 5 (23 TTABVUE 6).

⁴⁰ Applicant's ACR Brief p. 19 (32 TTABVUE 20).

⁴¹ Applicant's ACR Brief p. 19 (32 TTABVUE 20).

⁴² Applicant's ACR Brief p. 19 (32 TTABVUE 20).

⁴³ Applicant's ACR Brief p. 20 (32 TTABVUE 21).

previously have been seen in the marketplace. Consideration must be given to the fact that a purchaser's recollection of design marks is often of a general and hazy nature. *See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 177 USPQ 573 (CCPA 1973); *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990); *Bausch & Lomb Inc. v. Gentex Corp.*, 200 USPQ 117, 121 (TTAB 1978); *Matsushita Electric Indus. Co., Ltd. v. Sanders Assoc., Inc.*, 177 USPQ 720, 726 (TTAB 1973); *see also Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc.*, 176 USPQ 199, 200 (CCPA 1972).

Opposer's mark features a stylized infinity symbol, while Applicant's mark features a stylized depiction of a design which does not convey the same impression as Opposer's mark. Apart from the fact that both marks feature two lobes, the marks contain different elements, including lobes of different shapes and configurations. The lobes in Opposer's mark form the recognizable shape of the "infinity" symbol, and the lobes in Applicant's mark are of circular shape remaining open in-part, rendering a different overall image and commercial impression. The descriptions of the parties' marks in their respective Registrations and application also differ. Opposer's marks are described as consisting of "an infinity symbol,"⁴⁴ while Applicant's mark is described as consisting of a "stylized, interrupted infinity representation."⁴⁵ Although the parties' designs to the extent they are reminiscent of an infinity symbol may be frequently encountered in a broad sense, this is quite different from concluding that

⁴⁴ *See* description of Opposer's marks in Registration Nos. 3865939, 3938591 and 3975301.

⁴⁵ *See* description of Applicant's mark.

they are the same or similar design. *See, e.g., Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404 (TTAB 1988) (stylized design of houses found to be dissimilar).

Although there is a general similarity in the parties' marks, we find this similarity is outweighed by the differences. When viewed in their entirety, the designs of Opposer's and Applicant's marks are clearly distinct in overall appearance such that they create different overall commercial impressions on purchasers.

5. The Number and Nature of Similar Marks in Use in Connection with Similar Goods

The sixth *DuPont* factor considers "[t]he number and nature of similar marks in use on similar goods," and "addresses marks similar to an opposer's registered mark, to demonstrate the strength or weakness of that mark." *Stoncor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014); *Palm Bay Imps., v. Veuve Clicquot*, 73 USPQ2d at 1693 (addressing significance of evidence of third-party use of marks similar to a registered mark to assess the strength of that mark). "The weaker [a registrant's] mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Applicant argues that the sixth *DuPont* factor weighs against a likelihood of confusion because the presence of the "infinity loop" in third-party registrations

shows that Opposer’s mark is weak and entitled only to a narrow scope of protection.⁴⁶

In support, Applicant introduces nineteen⁴⁷ active third-party registrations for marks containing the “infinity loop” symbol involving the same goods, or related goods, to those listed in Opposer’s registrations:

Mark	Registration No.	Int’l Class	Goods
	4894840	25	Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic tops and bottoms for sports wear; Clothing, namely, tops, shirts, bottoms, pants, shorts, shoes, caps, hats, socks . . .
	4679653	5	Preparations for repelling water; Shoe deodorizers
		25	Cleats for attachment to sports shoes; Compression garments for athletic or other non-medical use, namely, shirts, pants, calf sleeves, arm sleeves; Insoles for footwear; Socks
		26	Shoe laces (also goods in Classes 3 and 10)

⁴⁶ Applicant’s ACR Brief p. 23 (32 TTABVUE 24).

⁴⁷ See Applicant’s ACR Brief pp. 24-27 (32 TTABVUE 25-28); Applicant’s Notice of Reliance, Exhibit No. 7 (31 TTABVUE 6-9, 245-284).

Registration No. 4378278 for the mark  cited by Applicant has been cancelled for failure to file a § 8 declaration and has not been considered. Applicant’s Notice of Reliance, Exhibit No. 7 (31 TTABVUE 269-270). This cancelled registration is only evidence that the registration issued, and is not evidence of use of the registered mark at any time. See, e.g., *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“a canceled registration does not provide constructive notice of anything”).

	5857629	25	Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms
	5799319	25	Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms (also goods in Class 14)
	5313523	25	Goods including: Men's, women's, and children's apparel, namely, underwear, footwear, caps, belts, bottoms, cardigans, coats, dungarees, gloves, golf shirts, head wear, jackets, jeans, jogging suits, knit tops, overalls, pants, shirts, shoes and boots, shorts, socks, polo shirts, sweaters, sweatpants, sweatshirts, t-shirts; Athletic apparel, namely, hoodies, tops, sports bras, and pants . . .
	5629210	28	Goods including: Shin guards and hand pads for athletic use; Balls for games; Body-building apparatus; Bows for archery; Exercise equipment, namely, exercise bands, training bars, rowing machines, not for physical therapy purposes; Exercise weights; Boxing gloves; Punching bags; Wrist guards for athletic use . . .
	5587601	25	Athletic apparel, namely, tops, bottoms, hats, caps, shorts, pants, shirts, jackets, vests, bras, socks, gloves, leggings, swimwear, and underwear

	4855344	25	Athletic tops and bottoms for yoga; Yoga pants; Yoga shirts
	6052759	25	Goods including: Footwear; Boots; Athletic footwear; Waterproof footwear; Leather shoes; Leisure shoes; Socks; Non-slip socks; Anti-perspirant socks; Toe sock; Insoles for footwear . . .
	4699870	25	Goods including: Clothing, namely, shirts, tops, t-shirts, sweatshirts, sweaters, pullovers, jackets, coats, pants, sweatpants, jeans, shorts, belts and wristbands; athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, jerseys and athletic uniforms; footwear, namely, boots, shoes, socks; headwear, namely, hats, caps, visors . . .
	4544497	25	Footwear; athletic footwear; jackets, track jackets, track pants, T-shirts, sweat shirts
	4721956	25	Goods including: bandanas; neckerchiefs; belts; footwear; boots for sports; headwear; clothing for gymnastics, namely, shorts and shirts; coats; gymnastic shoes; half-boots; hats; headbands for clothing; headwear; jackets; leggings; knitwear clothing, namely, shirts; leg warmers; mittens; motorists' clothing, namely, jackets, shirts and pants; outer clothing, namely, coats, jackets; ready-made clothing, namely, shirts,

			<p>pants; rubber shoes; shirts; shoes; ski boots; ski gloves; socks; sweat socks; sweaters; T-shirts; track suits . . .</p> <p>(also goods in Classes 24 and 28)</p>
	4065534	25	<p>Goods including: Camp shirts; Golf shirts; Hooded sweat shirts; Knit shirts; Long-sleeved shirts; Open-necked shirts; Polo shirts; Rugby shirts; Short-sleeved or long-sleeved t-shirts; Sports shirts; Sweat shirts; Triathlon clothing, namely, tights, shorts, singlets, shirts, suits; Wind shirts and pants; Yoga shirts; Track pants; Waterproof jackets and pants; Yoga pants; Jogging pants; Ski pants; Snow pants; Sweat pants; Gym shorts; Rugby shorts; Shorts; Denim jackets; Fishermen's jackets; Men's and women's jackets; Rain coats; Riding coats; Wind coats; Athletic shoes; Baseball shoes; Bowling shoes; Boxing shoes; Canvas shoes; Cycling shoes; Deck-shoes; Fitted shoe or boot covering to protect from water or other damage; Football shoes; Golf shoes; Gymnastic shoes; Handball shoes; Hockey shoes . . .</p>
	5255270	28	<p>Goods including: Elbow and knee guards for athletic use; and additional goods including artificial fishing bait, hooks, reels, tackle, rods and lines; Body-building and body-training apparatus; Protective paddings for</p>

			Taekwondo; Weight lifting belts . . .
	5203119	28	Goods including: Elbow guards and knee guards for athletic use; Appliances for gymnastics; Balls for games; Balls for sports; Body-training apparatus; Boxing gloves; Chest expanders; Dumbbells; Exercise equipment, namely, exercise bands, training bars, rowing machines; Punching bags; Shin guards for athletic use; . . .
	5073952	18 25	Gym bags Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic pants; Gym shorts (also services in Class 41)
	4989532	25	Goods including: Athletic apparel, namely, shirts, pants, jackets, footwear, hats and athletic uniforms; Athletic shirts; Jackets and socks; Motorcycle gloves; Tee shirts . . .
	4298474	10 25	Arch supports for boots or shoes Work boots (also goods in Class 1 and services in Class 35)
	6016532	25	Goods including: Athletic and sports clothing, namely, pants, shorts, shirts, t-shirts, and hats; casual clothing, namely, pants, shorts, shirts, t-shirts and hats; clothing for sports,

			<p>namely, pants, shorts, shirts, t-shirts, and hats; clothing, namely, hoods, jackets, jerseys, and pants; martial arts uniforms; clothing for wear in jiu jitsu practice; . . .</p>
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In view of these third-party registrations for marks that include an “infinity” symbol for goods including footwear, apparel, protective pads for sports or athletic activities, and athletic and sports bags, Applicant argues that the “infinity loop symbol” in Opposer’s marks is limited to the narrowest scope of protection.⁴⁸

“[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (at least fourteen examples of third-party registered marks used in commerce), citing to *Juice Generation v. GS Enters.*, 115 USPQ2d at 1674 (at least twenty-six relevant third-party uses or registrations of record). The Federal Circuit has acknowledged that evidence of third-party registrations is relevant to show that “some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Jack Wolfskin v. New Millennium Sports*, 116 USPQ2d at 1136 quoting *Juice Generation v. GS Enters.*, 115 USPQ2d at 1675.

⁴⁸ Applicant’s ACR Brief p. 27 (32 TTABVUE 28).

In this case, unlike *Juice Generation* and *Jack Wolfskin*, there is no evidence of third-party uses of marks containing the “infinity” design. The fact that there are a number of registered marks containing an infinity design does not reflect a crowded marketplace, nor is it evidence of descriptiveness.

Instead, this is a case where the registrations indicate only that their owners thought the infinity symbol to be an appropriate trademark for their goods. As explained in *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967):

All that the third-party registrations demonstrate is that their owners believe the term “LILLY” to be appropriate for a trademark for women’s dresses. The question still remains whether the marks viewed as a whole are confusingly similar. The existence of third-party registrations of similar marks has very little weight on this question.

Based on the marks shown in the registrations identified in the search, Applicant’s mark is no more similar to Opposer’s mark than the registered marks shown in the search results. Because “infinity” designs in a broad sense have been registered by third-parties, in whole or in part, as marks in connection with goods similar to those of both parties, i.e., footwear, apparel, protective pads for sports and athletic activities, and athletic and sports bags, the dissimilarities in Opposer’s and Applicant’s marks outweigh the similarities. However, this evidence by itself is entitled to very little weight.

6. Actual Confusion

The seventh and eighth *DuPont* factors consider the nature and extent of any actual confusion in light of the length of time and conditions under which there has

been contemporaneous use of the parties' subject marks. *DuPont*, 177 USPQ at 567. Applicant argues that the record is devoid of any evidence of actual confusion arising from the use by the parties of their marks on their respective products.⁴⁹

Evidence of actual confusion, where it exists, would of course be highly probative of a likelihood of confusion. *See Edom Labs, Inc. v. Lichter*, 102 USPQ2d 1546, 1553 (TTAB 2012) ("The existence of actual confusion is normally very persuasive evidence of likelihood of confusion and undercuts any possible claim that the marks are so dissimilar that there can be no likelihood of confusion."). It has often been recognized that such evidence is difficult to obtain. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012). The opposite, however, is not true; an absence of evidence of actual confusion usually carries little weight. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965).

Therefore, the seventh *DuPont* factor is neutral. We hasten to add that since the issue before us is the likelihood of confusion, not actual confusion, it is not necessary for Opposer to show instances of actual confusion to establish likelihood of confusion. *Herbko Int'l. v. Kappa Books*, 64 USPQ2d at 1380; *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990).

The eighth *DuPont* factor considers the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Applicant contends that the lack of evidence establishing actual confusion weighs against

⁴⁹ Applicant's ACR Brief p. 27-28 (32 TTABVUE 28-29).

finding a likelihood of confusion where, as here, the marks have been in use on identical and related goods. But the absence of reported instances of confusion is meaningful only if the record establishes appreciable and continuous use by Applicant of its marks for a significant period of time in the same markets as those served by Opposer under its mark. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *17 (TTAB 2020); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Given Applicant's argument that Opposer's and Applicant's marks have existed in the marketplace for over six years,⁵⁰ unsupported by evidence of Applicant's sales and advertising, the lack of any instance of actual confusion is not indicative of an absence of a likelihood of confusion. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet v. Johnstown Am.*, 7 USPQ2d at 1406-1407. Thus, the eighth *DuPont* factor is also neutral.

VI. Conclusion

We have carefully considered the testimony and other evidence pertaining to the relevant *DuPont* factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion. To

⁵⁰ Applicant's ACR Brief p. 28 (32 TTABVUE 29).

the extent that any other *DuPont* factors for which no evidence was presented may be applicable, we treat them as neutral.

Opposer's and Applicant's marks are used in connection with identical in-part and otherwise closely related goods that are likely to move in the same channels of trade to some of the same customers. Turning to the marks, Opposer's mark is a stylized infinity symbol. On the other hand, Applicant's design mark is a different shape than a traditional infinity symbol that is composed of two circles opening up into one another. Thus, the designs of Opposer's and Applicant's marks are not similar in appearance or meaning resulting in the marks having different commercial impressions sufficient to avoid a likelihood of confusion. Notwithstanding that the goods are, in part, identical, and the channels of trade and purchasers overlap, we conclude that the marks are too dissimilar to warrant a determination of likely confusion. We consider this *DuPont* factor dispositive in this case. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (holding that Board did not err in deciding likelihood of confusion based solely on dissimilarity of marks regardless of other *DuPont* factors that favored a likelihood of confusion, noting that "we have previously upheld Board determinations that one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks"); *Kellogg Co. v. Pack'em Ent. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive.").

Opposition No. 91241564

Decision: The Opposition to registration of the mark  shown in Serial No. 87493133 under § 2(d) of the Trademark Act is dismissed.